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"THE RIGHT OF WOMEN TO MAKE A LIVING"

DISSENTING OPINION

OF

CHIEF JUSTICE WALTER CLARK

IN

BICKETT v. KNIGHT

IN WHICH THE CHIEF JUSTICE SUSTAINS THE RIGHT OF THE GENERAL ASSEMBLY TO AUTHORIZE WOMEN TO ACT AS NOTARIES PUBLIC. BROWN, J., ALSO DISSENTING.

Clark, C. J., dissenting: There is but one question presented by this appeal.

The General Assembly of North Carolina at its late session enacted chapter 12, Laws 1915, as follows: "The Governor is hereby authorized to appoint women as well as men to be notaries public, and this position shall be deemed a place of trust and profit, and not an office."

Upon this authority from the lawmaking department of the Government, to whom by the Constitution that duty is intrusted, the Governor of the State issued his commission to Mrs. Noland Knight, the defendant, as a notary public. Thereafter this *quo warranto* proceeding was brought, averring that a notary public was not a place of trust or profit, as the Legislature had enacted, but was in truth an office, and therefore that the commission issued to her by the executive department of the State under the authority of the Legislature was a nullity because she was a woman.

The action was brought before *Judge Webb* of the Superior Court, who sustained the action of the General Assembly and of the Governor, and declined to hold their acts void. On argument in this Court, the Attorney-General, while he combated some of the propositions of the defendant's counsel, admitted that the act was valid, saying then, and also in a written opinion: "In the face of the legislative declaration, there ought not to be any serious trouble about the matter."

The sole question, therefore, is, after this action of the lawmaking department and the Governor, and the admission of the relator, the Attorney-General, himself, in open court, "Ought the defendant be deprived of her appointment?" There can, of course, be other questions, more or less collateral, discussed, but that is the sole question presented on this record. If she can be thus deprived, it can be done only upon the ground that the above acts of the Legislature and of the Governor are in

violation of the Constitution. It cannot be contended that the Legislature acted ignorantly or unadvisedly. In that body there were many able men, among whom were lawyers of acknowledged prominence and recognized ability. They were under an oath to support the Constitution, as much so as the members of this bench. No one will impute to that body a desire to evade or fraudulently circumvent the Constitution which they were sworn to support. No one has suggested that. The matter was fully discussed in both houses, was thoroughly understood, and the bill passed the General Assembly by a large majority in both houses.

If this Court deems it is its duty to so decree, it ought to point out the paragraph in the Constitution which gives it the power, in its opinion, to hold this action of the Legislature and the Governor in violation of the Constitution; for the Governor as well as the members of the General Assembly are under the sanction of an oath to maintain the Constitution. The act "authorized" but did not require him to appoint women notaries public.

The General Assembly of 1913 passed an act in almost identical terms authorizing the appointment of women as trustees upon the public school boards, and with the same provision, that such "position shall be deemed a place of trust and profit, and not an office." That act has been recognized without question and acted upon. One hundred and fifty women have been appointed to such positions and have discharged the duties thereof with credit to themselves and to the benefit of the public.

There is no provision of the Constitution which defines an "office," and none which creates the position of notary public. The Legislature, therefore, could not act in violation of the Constitution in drawing the line, as it did, between positions of trust or profit and offices. Certainly not, unless the duties of a notary public are of themselves so inherently an office and unless it has been so generally recognized as such that to term it not an office would be a fraud in legislation.

Every department of the State Government has always recognized that a notary public is not an office, for in this Legislature, as in preceding ones, several members were at the same time notaries. The Constitution forbids persons holding two offices at the same time. Art. XIV, sec. 7. Yet no Legislature has ever held that a member could not be a notary. The Governors (most of whom have been lawyers) have appointed members of the Legislature to be notaries while continuing to sit as members, and no court has ever held the act of any notary invalid because he continued to act as such while a member of a Legislature. The effect of the majority decision in this case may invalidate many instruments acknowledged before notaries, heretofore recognized as valid.

The words "office" and "public office" are very frequently used loosely without any intention to draw the line as to whether a position is an "office," a "place of trust or profit," or a "public employment," and it is due to that fact that many opinions have spoken of the position of notary public as an office. "Office" means simply a "duty," from the Latin word

officium; and as this position is called "notary public," it has been frequently, in casual writing of opinions, referred to as a public office.

But there has been no opinion of the Supreme Court of this State nor, it is believed, of any other State which has ever held the position to be a "public office" when the line was being drawn between "public offices" and "places of trust or profit" or "public employment." It is stated positively, after much research, that no court at any time, in any State or country whatever, has held the position to be a public office when there was an act of the Legislature decreeing it not to be a public office. In the *Opinion of the Judges,* 165 Mass., 599, the Court held that in that State the position of notary public was named and created by the Constitution, and therefore the Legislature could not make it a "place of trust or profit" or a public employment merely, stating, however, that if the position was created (as it is in this State) by the Legislature, that body would be competent to make it such position as they saw fit.

In this State there have been two or three decisions which loosely refer to the position of notary public as an "office," but that was at the time when the statute referred to it as an office. It took its rank as an office from such statute, and if the General Assembly had the power to pass the act recognizing it as an office, the General Assembly of 1915 had the power to make it a "place of trust or profit." Nothing is better settled than that the act of one Legislature can be repealed or amended by a succeeding one. Neither act has any validity except as the organized expression of the public will of the time, which is subject to change or modification by any subsequent legislature.

In our own State this Court has followed (*Mial v. Ellington,* 134 N. C., 131) the decisions, universal elsewhere, that the Legislature has entire power over offices created, not by the Constitution, but by the Legislature itself (*Scown v. Scarnecki,* 164 Ill., and numerous cases there cited), and has said in words exactly applicable to the facts of this case (*Brown v. Turner,* 70 N. C., 100): "When the Legislature created and called it an office it was an office, not because the peculiar duties of the place constituted it such, but because the creative will of the lawmaking power impressed that stamp upon it; therefore, when that stamp was effaced by the repealing act it shrank to the level of an undefined duty. The authority that invested these duties with the name and dignity of a public office afterwards divested them of that name and dignity."

We have, however, had two instances in this State in which the question was sharply presented whether the position of notary public was an office or not, and in both it was held not to be, and in those cases only was the question squarely presented.

In 1867 it became an important matter to draw the line between what positions in this State were offices and what were not. The Attorney-General of the United States, on 12 June, 1867, published his "considered opinion" (as our Court styled it), in which he defined what positions were offices and what public employments were not offices. The thir-

teenth paragraph in his opinion, after reciting what were "offices," says, as to those "*not* offices": "13. Persons who exercise mere agencies or employments under State authority are not disqualified, such as commissioners to lay out roads, commissioners of public works, visitors of State institutions, directors of State banks or other State institutions, *notaries public, commissioners to take acknowledgment of deeds, and lawyers.*" That opinion of the Attorney-General of the United States is quoted in full by our Supreme Court and adopted, *Worthy v. Barrett,* 63 N. C., at p. 203.

This Court subsequently and continuously down to this time has recognized its correctness, for this Court without question has been licensing women as lawyers, certainly a far more important position, and the statute requires that all lawyers must take an oath of office and an oath of allegiance both to the State and Federal Governments.

The only other case in which the point has been exactly presented was *Lawrence v. Hodges,* 92 N. C., 681. The Constitution, Art. XIV, sec. 7, provides: "No person who shall hold any office or place of trust or profit under the United States, or this State, or any other State, . . . shall hold or exercise any other office or place of trust or profit under the authority of this State." Revisal, 2349, provides: "The clerks of the Superior Court may act as notaries public in their several counties by virtue of their office as clerks, and may certify their notarial acts under the seals of their respective courts." It cannot be contested that clerks of the courts are public officers created by the Constitution. If, therefore, the position of notary public was an "office" also, the same person could not hold both positions. The act of Congress required certain mortgages on vessels to be acknowledged before a notary public, and in *Lawrence v. Hodges* the question was presented whether the clerks were valid notaries public, and it was held in 92 N. C., at p. 681, that they were. It thus conclusively appears that in both the cases in which the point was presented the position of notary public was held not to be an office.

McCullers v. Comrs., 158 N. C., 80, holding that the Governor and others can discharge certain functions *ex officio,* in no wise conflicts with *Lawrence v. Hodges.* If it did, all that would be necessary would be to provide that any woman who held the position of school trustee, to which she is eligible, can *ex officio* discharge the duties of a notary public. The position of "lawyer" has been often styled an "office," but women were admitted to the bar in this State because it was found that to hold that position an office would disqualify a large part of the Legislature and many other officeholders, State and Federal. While the statute incidentally refers to notaries public and lawyers as officers, there has been no express decision that a notary public is an office, till now.

But it has been argued by some that the position of notary public was an office at common law. If it had been, the common law is simply the

English law, the largest part of which was the decisions of the English judges based upon their customs or the construction of their statutes, and of course subject to be changed at will by the Legislature of North Carolina in all matters that concern our self-governing people. In fact, however, a letter from Sir John Simon, at present Attorney-General of England, written in January of this year, says: "No act of Parliament has ever disqualified women from holding the position of notary public in this country, and it is very certain that none such could be passed." Even if it had been otherwise, it would not have disqualified the General Assembly of North Carolina from defining it to be a mere place of trust or profit, and authorizing women to hold it.

In *U. S. v. Bixby,* 10 Bizzell, 520, it was held by *Gresham, J.,* that "at common law a minor is eligible to the position of notary public." In Virginia, which naturally more nearly follows the English law than any other State in this Union, its Attorney-General says: "In this State any man or woman over 18 years of age can be a notary public."

But aside from any statute which (like our act of 1915) expressly makes the position "a place of trust or profit," or our previous statute, which, without expressly making it an office, merely required an oath of office (as is also required of lawyers, public administrators, and others who have been held to be not officers), the position in itself inherently is not an "office." The duties of a notary public are prescribed (Rev., 2350) and are purely those of certificate and analogous to those of a commissioner to take affidavit, and have in them no element of an office.

The decisions have all held that to be a "public office" as distinguished from a "place of trust or profit" or a "public employment" the officer must possess and exercise some of the sovereign powers of the State, either executive, legislative, or judicial. *S. v. Smith,* 145 N. C., 477, citing Mechem on Pub. Officers, sec. 1. A notary public cannot legislate. A notary cannot execute the law, and has no judicial functions. The duties of the position are simply to take down and certify evidence. For the purpose of certification, the notary has a seal, just as formerly any grantor in a deed had, to authenticate his act by his seal. This did not make every grantor a public officer. It is true that in certain rare cases a notary public has the power of contempt. So by statute has every referee in North Carolina (Rev., 492), but a referee certainly is not therefore an officer.

The entire experience and recognition of the rest of the world is against the position being *ex vi termini* a public office. In Massachusetts and in Ohio and one or two other States the position has been made an office by the Constitution or a statute. After the passage of this act of our General Assembly an official inquiry was instituted as to the status of notary public in the other States. The replies from their judicial departments show that out of the fifty-three jurisdictions in the United States (*i. e.,* forty-eight States, the District of Columbia, and the

territories of Alaska, Porto Rico, Hawaii, and the Philippines) women are competent to be notaries public in all except ten, and in those ten they were held incompetent either because, as in Massachusetts, the Constitution had made the position an office or a statute had made it an office, or, as in a few of them, "it had not been the custom to admit women to hold the place, and there was no statute as yet authorizing them to fill the position." In no case was there found, or reported, a decision holding women incompetent to fill the place when there was a statute authorizing them to do so, or providing that the position was not an office. Outside of these ten States (of our fifty-three jurisdictions) there is no country which disqualifies a woman to hold the position of notary public. There are semicivilized and barbarous countries in which they are allowed to hold no position whatever, and in those countries there is probably no such position.

There have been many cases in this Court, of course, holding acts of the Legislature unconstitutional. But no one has ever found express authority in the Constitution to do so, and it is claimed to exist by construction and inference of the courts in their own favor. This Court has, almost in every instance, therefore, wisely taken the pains to say that it will not exercise this assertion of supreme power in setting aside the action of the other departments of the Government unless such action was clearly unconstitutional, and has repeatedly quoted on this point *Ogden v. Sanders* (U. S. Supreme Court), 12 Wheaton, at p. 270, in which it was held that the highest Court in the Union would not even hold a State act unconstitutional as in violation of the Federal Constitution unless it were so "beyond all reasonable doubt." This is the considerate language of that high Court: "It is but a decent respect due to the wisdom, integrity, and patriotism of the legislative body, by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved *beyond all reasonable doubt.*"

Ought not this Court to follow what we have so often quoted and approved, and out of a "decent respect to the wisdom, the integrity, and the patriotism of the legislative body" hold that the violation of the Constitution by that body in this case "is not proved beyond all reasonable doubt"?

This position had its origin in the Roman civil law. Its duties were, and still are, like those of a stenographer, with power only to certify the evidence taken down or acknowledgments made of instruments. The notary public has no legislative, executive, or judicial authority. He cannot even probate a deed, but merely certifies its acknowledgment (*White v. Connelly,* 105 N. C., 65), though it is held that even a deputy clerk, who can probate it, is not an officer.

The Attorney-General of the State, in this very case, appearing in open Court, admitted the validity of this statute. The Attorney-General of the United States has said in an official opinion that "commissioners

of affidavits, *notaries public*, and lawyers" are not public officers, and this Court in an unanimous opinion affirmed that ruling and have acted upon it ever since as to the other two positions. Why overrule it now as to notaries public alone? The Attorney-General of Great Britain says that the law does not disqualify women from being notaries public. Why should we disqualify them? In all the other States and territories of the Union, except ten, women are admitted to be notaries public. In our own State the Revisal, 3349, permits the clerk of the court to be a notary public, which he could not be if it was an office, and this Court held, as above stated, that he was a valid notary public where the validity of a mortgage under a United States statute required the instrument to be acknowledged before a notary public. In the ten States not permitting women to be notaries public there is no statute permitting them to be.

If any opinion I have ever written, when the statute as to notaries was different, could be fairly construed as opposed to what is herein said by me, under the present statute, it would not be an estoppel to hold correctly in this case. Besides, I have no pride of opinion that compels me to prefer former opinions, if erroneous, to doing justice now. I have never deemed myself infallible, but hold that all judges should be glad of opportunity to correct their mistakes. We should grow wiser with the years; otherwise, experience is of no value. The infallibility of judges is not an American doctrine, nor indeed is it held anywhere.

Under changing conditions, due largely to the introduction of machinery, women are forced to seek new and wider employment. The Legislature, recognizing this, and learning that in some quarters there was opposition to their receiving fees in the purely clerical work of a notary public, owing to some passing references to the position as an "office" in two or three decisions, passed an act making the position merely "a place of trust or profit," and not an office, and specifically authorizing the Governor to appoint women. This was purely a political question, and the Legislature was acting with an intelligent understanding of changed economic conditions and in a humane desire to do justice to a deserving class, and with full recognition of their obligation to observe the Constitution. The Governor was "authorized," not "required," to appoint women. He is one of the foremost lawyers of the State, with the intelligence, firmness, and patriotism to know and maintain the limitations of the Constitution. He appointed the plaintiff to this position. The judge of the lower court, sworn also to obey the Constitution, and a learned lawyer, held that it was no violation of the Constitution for the Legislature to so enact. Our Attorney-General, who brought this action, stated on the argument, after fuller investigation, and also in writing, his opinion that the action of the Legislature is constitutional.

Ought this Court, by three votes to two, hold that this action of the executive department and of the Legislature and by the other judicial officers who have passed upon this matter has been beyond question a violation of the Constitution, and that, too, without specifying the provision of the Constitution that has been so dangerously and alarmingly violated when the Legislature has permitted women working for a living to earn a few needed fees by authorizing them when taking down and certifying evidence merely to authenticate their certificates by adding the impression of a seal? The statute provides that such impression of a seal does not make the position an office.

It has been urged, however, that fees are paid for impressing the seal! "Ay! there's the rub." Women are not voters, and there are those who think that fees should be reserved exclusively for voters, in recognition of their services. But these fees are not paid by the State or county, but by individuals, and notaries receive no salaries.

It was held in *Brown v. Turner,* 70 N. C., 100, that the position of Public Printer, worth many thousands of dollars, which the previous statute had made an "office," was reduced to the grade of a "place" because the Legislature said so, though the effect was that a Republican Court thus admitted the validity of the act of a Democratic Legislature in filling the "place" with a Democrat when the Republican Governor, holding it to be an "office," had appointed one of his own party.

In *S. v. Smith,* 145 N. C., 476, this Court held that a public administrator who has a term of eight years, gives bond, and takes an oath of office (Rev., 19) is a mere "place" and not an "office," *Brown, J.,* quoting from *Chief Justice Marshall,* saying that "Although an office is a public employment, it does not follow that every public employment is an office." *S. v. Smith* was cited with approval by *Allen, J.,* in *Boynton v. Heartt,* 158 N. C., 490.

The Constitution of this State does not prohibit the Legislature from admitting women to any office. The prohibition is just the opposite, and merely forbids any one who is a voter from being disqualified to hold office. *S. v. Bateman,* 162 N. C., 591.

Even if every position created by the Legislature, however small, could be held to be an office, notwithstanding legislative enactment to the contrary, the Constitution of this State has never made the requirements for voting and for holding office the same. Prior to 1868 the Constitution imposed the ownership of property as a prerequisite for certain offices. The Constitution of 1868, discarding all that, imposed the sole limitation upon the Legislature that no voter should be disqualified to hold office, with the exceptions therein named; which exceptions do not name women.

Singularly enough, the majority opinion in this case quotes from a judge who was a woman (Portia), when she held that Shylock's demand of a "pound of flesh" must be granted, because else the ruling would be

"recorded as a precedent," etc. It will be recalled, however, that she almost immediately reversed that ruling, to which she had been over-persuaded, and rendered a just judgment on the merits. That case has been famous for ages as showing the competency of a woman for judicial position, in that she administered justice and was superior to the superstition that erroneous precedents are more sacred than justice. A woman herself, Judge Portia certainly did not intend that her decision should be quoted as authority that a woman could not be a notary.

The General Assembly has all the powers of legislation that the people themselves have, unless restrained by some provision of the Constitution. Cannot the Legislature of a sovereign State provide that the function of authenticating a certificate or acknowledgment or protest by making the impression of a seal on paper shall be a "place" and not an "office"? And that women may receive the fees for such work, if appointed?

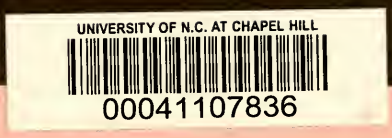
The feudal and medieval theory as to women—"half angel and half idiot"—meant in practice that those above the necessity of work might be on public occasions spoken of as if "half angels," but that all classes of them and all the time, were treated as at least "half idiots" and without legal rights. If married, they were submerged in the existence, and under the power, of their husbands, who had the right even to chastise them at will. This last right persisted in North Carolina down to 1874, when *Settle, J.*, in *S. v. Oliver,* 70 N. C., 61, said the courts had "advanced from that barbarism"—thus overruling the then recent cases of *S. v. Black,* 60 N. C., 262; *S. v. Rhodes,* 61 N. C., 453, and others. In all progressive communities feudal ideas have passed, or are passing, and women are held to be human beings, entitled to equal rights with men.

There is but one question in this case, "Can this defendant discharge the duties of a notary when so authorized by an act of the Legislature and commissioned by the Governor? Or is she barred because she is a woman?"

Under the Constitution of the United States no one is debarred from holding any office, from President down, because of sex. What provision of the State Constitution will be shattered, and what detriment will the public welfare receive, if by legislative and executive authority a woman shall authenticate a certificate, made by herself, by impressing the seal upon a piece of paper?

If the plaintiff were a man he would not be debarred from holding this appointment unless he were an idiot, a lunatic, or a convict. The Legislature, voicing the sentiment of the people of the State, have enacted that it is neither a crime nor a defect in this appointee to discharge the clerical duties of a notary public because she is a woman. Shall the Court hold that it is?

BROWN, J., also dissents.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